IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1061 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NARESHBHAI MAGANBHAI SENMA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MS SADHANA SAGAR for Appellant(s) : 1,
MR R.M.CHAUHAN, Ld.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. By means of filing the present appeal, the original accused of Sessions Case No.243 of 1998 has assailed

the legality and validity of the order of conviction and sentence passed by the learned City Sessions Judge (Court No.18), Ahmedabad whereby he has held the appellant guilty of the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code ('IPC', for short). The order under challenge is of 31st August, 2000 and the same is assailed on various grounds placed before us by the appellant.

2. Mrs.Sadhna Sagar, learned advocate appearing for the appellant has taken us through the oral as well as documentary evidence led by the prosecution and tried to convince us that the order of conviction and sentence is bad and the same is not sustainable.

3. On the other hand, it is argued by learned Addl. Public Prosecutor Mr.R.M.Chauhan that the order under challenge is based on sound reasons and the accused has been rightly held guilty of all the three offences by the impugned judgment.

4. Mrs. Sagar as well as Mr.Chauhan took us through the nature of evidence available on record and the case placed before the Trial Judge by prosecution.

5. To appreciate rival contentions, it would be

appropriate for us to state some facts in brief.

(i) As per prosecution case, on 23rd April, 1996, at about 5=00 p.m., when a minor girl Jashoda was at her house and under the lawful guardianship of her parents, at that time because of inducement this minor girl Jashoda climbed on to roof of her house, and, thereafter jumped from it. The accused at that relevant point of time was standing in the very small street who kidnapped Jashoda. As per say of the prosecution, she was taken to Village Boru of Dist:Mahesana, Tal:Vijapur with an ill-intention to have illicit intercourse with her and ultimately, there she was subjected to rape. According to prosecution, minor girl Jashoda had developed some acquaintance with the accused as he was residing in neighbouring area and on 16th April, 1996 the accused had made ill-attempt and had taken the girl with him to his village Boru from where she was brought back by the complainant father Bhikhabhai Danabhai Nadiya. But, on that day no formal complaint was filed. It appears that the prosecution has placed this fact to prove the ill-intention of the mind of the accused and the motive behind the commission of the offence. We have seen charge framed vide Exh.2. The accused is not charged for the wrong committed

by him on 16th April, 1996. He has been charged and tried for the offence committed by him on 23rd April, 1996 onwards and from that period till the victim girl Jashoda was traced and the accused came to be arrested.

6. To prove the charge, prosecution has examined number of witnesses. However, Mrs.Sadhna Sagar has taken us through the depositions of the complainant father P.W.No.3, Exh.8 and minor girl Jashoda, P.W.No.4, Exh.12. The evidence given by Dr.Bharat Shankarlal Dave Exh.15 is also read over to us.

7. After reading the evidence of one Manojkumar Nandulal Bhavsar and the deposition of the father of the victim qua the age of victim girl, Mrs.Sadhna Sagar has fairly conceded to one situation that the order of conviction can be said to have been passed on sound reason. It is satisfactorily proved by the prosecution that on 23rd of April, 1996 when she was kidnapped, as per the charge framed against the appellant, she was below 15 years of age as the date of birth of victim girl as proved by prosecution is 25th April, 1981. The oral say of the father of the complainant gets strong and direct corroboration from documents vide Exh.10

i.e. birth certificate tendered in evidence by him. As an attempt to prove the genuineness of this document which is produced at Exh.10, the prosecution examined Manoj Bhavsar P.W.No.8 and when the court placed a pointed query to the learned counsel that what she wants to say in response to the document of Manoj Bhavsar and document produced by him i.e. the birth certificate Exh.10, she has fairly accepted that evidence as to the age of victim is satisfactorily brought on record by the prosecution. In the present case, even if it is accepted by the Court that the intercourse was not forcible or against wish or will of victim Jashoda, even then the case would fall in the definition of “rape” as prescribed under Section 375 of IPC (6^{thly}). The fact that the accused had taken the girl Jashoda with him on 16th April, 1996 has remained practically un-assailed by the defence side.

8. Mrs.Sadhna Sagar has submitted before us that this Court may uphold the findings recorded by the learned Trial Judge so far as the recording of conviction against the appellant accused is concerned. But according to her, the order of substantive sentence passed and imposition of fine requires to be interfered with. As per the settled legal position, the

learned Judge is supposed to pass reasoned order to justify sentence that he intends to impose. In the present case, the accused has been awarded punishment of R/I for 5 years for the offence punishable under Sections 363 and accused is asked to pay a fine of Rs.1,000/- I/D. to undergo further S/I for 3 months. He has been sentenced to undergo R/I for 7 years for the offence punishable under Sections 366 of IPC and to pay a fine of Rs.1,000/- I/D. to undergo S/I for three months. So far as offence punishable under Section 376 is concerned, the accused is asked to undergo R/I for 10 years and to pay fine of Rs.2,000/- I/D to undergo S/I for one year. Of course, the learned Judge has ordered that the accused be given benefit of set off and all these sentences imposed for three different offences, shall run concurrently. So according to Mrs.Sagar, the accused shall have to remain in jail for at least 10 years and he being poor and not capable of paying fine of Rs.4,000/- he shall have to remain in jail for practically one and half year more than this period of punishment imposed by the learned Trial Judge, which can be said to be harsh and is not based on sound reason. She has brought following facts to our notice from the evidence led by the prosecution.

(I)The girl Jashoda had left house of her parents

voluntarily on 16th April, 1996 and she again left the house on 23rd April, 1996 when the present offence has been committed.

(II) There is some contradiction as to the presence of the accused in the street where she had jumped from the roof of her house so the inducement is inferred in the present case and as per the deposition of Dr.Bharat Dave victim girl Jashoda is found habitual for having sexual intercourse and this is neither the say of the prosecution nor the evidence available on record that she was taken for the first time on 23rd April, 1996 and, thereafter she was raped for the first time by the accused.

(III) It is on record that the accused hails from labour class and is doing personal labour work of collecting waste papers etc. from the streets and was earning some meagre amount and once the complainant or her parents had consented the girl Jashoda to accompany the accused and she had worked with the accused for some days when she was going with the accused to collect some waste papers, it appears that Jashoda had developed some attraction or acquaintance with the accused during that period may be of two years or 15 days or 20 days, but the fact remains that the accused was not totally

unknown to the victim girl. On the day on which she was examined, minor girl Jashoda was found to be fully developed girl and as per the birth date proved by the prosecution side, she had entered into major age and she was not of a very young age i.e. below ten years. No visible evidence as to recent intercourse was found by Dr.Dave.

9. In such a situation, the learned Trial Judge ought to have held that the prosecution has proved the offence of rape technically and this is not a case of forcible intercourse against the will of the victim girl. So it was necessary for the learned Trial Judge to consider these circumstances to award the minimum punishment prescribed for the offence punishable under Section 376 of IPC, but, it appears that learned Judge has not considered these aspects and has imposed R/I for 10 years.

10. We have carefully considered the submissions made by learned APP Mr.R.M.Chauhan. Considering the economic background of both the families and the fact that boy was doing labour work i.e. of collecting waste papers from the streets and the girl had also joined him for some days for the similar work, some leniency can be shown in the present case.

11. In view of other aspects referred to hereinabove, the substantive sentence as well as sentence of fine imposed by the learned Trial Judge can be reduced to some extent. According to us, imposition of minimum punishment prescribed i.e. of 7 years R/I would meet with the ends of justice, and, therefore, the substantive sentence is reduced to that period, so far as offence punishable u/S. 376 of IPC is concerned. In the same way for the offence punishable u/S. 363 of IPC punishment imposed for 5 years R/I is reduced 3 years and fine of Rs.1,000/- is reduced to Rs.200 I/D to undergo S/I for further 15 days, would meet with the ends of justice and also in the same way for offence u/S.366 of IPC punishment imposed for 7 years R/I if reduced to 4 years R/I and fine of Rs.1000/- if reduced to Rs.200/- and I/D of fine, S/I for further 15 days, would meet with the ends of justice. The amount of imposition of fine in certain cases are found symbolic as held in number of judgments pronounced by this Court as well as by the Supreme Court and while imposing the amount of fine, physical as well as financial strength of the accused is always required to be considered. Social back-ground is also found relevant while imposing the amount of fine. A labourer who was

collecting waste papers from the streets in a gunny bag everyday whether should be asked to pay total amount of fine of Rs.4,000/-, is a question. According to us, the learned Trial Judge ought to have imposed fine of Rs.200/- each so far as offences punishable under Sections 363 and 366 of IPC are concerned and Rs.300/- for the offence punishable under Section 376 of the IPC. So we reduce the amount of fine to that extent especially when there is no order of the learned Trial Judge for paying any amount of fine by way of compensation to the victim girl. When the learned Trial Judge has not decided to pay any amount as compensation from the amount of fine paid, we reduce the amount of fine accordingly and say that in default of paying fine he shall undergo S/I for 15 days, 15 days and 1 month respectively.

12. The appeal is partly allowed.

13. It is hereby ordered that impugned judgment and order of conviction for the offences punishable under Sections 363, 366 and 376 of Indian Penal Code passed against the accused Nareshbhai Maganbhai, is hereby confirmed but the order imposing sentences for all the three offences and also of fine, is hereby altered and modified as under:

(i) The order of sentence sentencing the appellant accused Nareshbhai Maganbhai to undergo RI for 5 years and to pay a fine of Rs.1,000/- (Rs. One Thousand Only), I/D to further undergo S/I for 3 months for the offence punishable under Section 363 of IPC is hereby altered and modified to the extent that appellant accused Nareshbhai Maganbhai is ordered to undergo R/I for 3 years and to pay a fine of Rs.200/- (Rs. Two Hundred Only), I/D to further undergo S/I for 15 days so far as the offence punishable under section 363 of IPC is concerned.

(ii) The order of sentence sentencing the appellant accused Nareshbhai Maganbhai to undergo R/I for 7 years and to pay a fine of Rs.1,000/- (Rs. One Thousand Only), I/D to further undergo S/I for 3 months for the offence punishable under Section 366 of IPC is hereby altered and modified to the extent that appellant accused Nareshbhai Maganbhai is ordered to undergo R/I for 4 years and to pay a fine of Rs.200/- (Rs. Two Hundred Only), I/D to further undergo S/I for 15 days so far as the offence punishable under section 366 of IPC is concerned.

(iii) The order of sentence sentencing the appellant accused Nareshbhai Maganbhai to undergo R/I for 10 years and to pay a fine of Rs.2,000/- (Rs. Two Thousand Only), I/D to further undergo S/I for 1 year for the offence punishable under Section 376 of IPC is hereby altered and modified to the extent that appellant accused Nareshbhai Maganbhai is ordered to undergo R/I for 7 years and to pay a fine of Rs.300/- (Rs. Three Hundred Only), I/D to further undergo S/I for one month so far as the offence punishable under section 376 of IPC is concerned.

14. Substantive sentences are ordered to run concurrently. Excess fine if paid, shall be refunded to the appellant-accused and if appellant accused has undergone R/I for 7 years as reduced by the court, he shall be set at liberty forthwith if not required to be detained in any other case. If fine is not paid, the accused appellant shall, obviously, undergo S/I imposed for default in paying amount of fine for each offence.

(C.K.BUCH, J.)

(H.N.DEVANI,J.)

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